

[Doc. Nos. 295 and 369]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC,
et al.,

Defendant.

Civil No. 04-1512-RBK-AMD

ORDER

This matter comes before the court upon the motions of Equity Receiver, Stephen T. Bobo, ("the Receiver") to compel Defendants Robert W. Shimer and Vincent Firth to produce copies of income tax returns. The Court has considered the submissions, and for the reasons set forth below and for good cause shown, the Court will grant the Receiver's motions to compel.

The factual basis for this action has been previously set forth in the Court's prior Report and Recommendation dated September 2, 2005 and will not be repeated herein. See Commodity Futures Trading Commission v. Equity Financial Group, LLC, No. 04-1512, 2005 WL 2143975 (D.N.J. September 2, 2005). On April 1, 2004, the Commodity Futures Trading Commission ("CFTC") filed a civil action seeking injunctive and other relief against Defendants Equity Financial Group, LLC; Tech Traders, Inc.; Vincent J. Firth; Robert W. Shimer; J. Vernon Abernethy; Coyt E. Murray; Magnum

Capital Investments, Ltd.; Magnum Investments, Ltd.; and Tech Traders, Ltd., for alleged violations of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 et seq.. On April 1, 2004, the Court entered an order that among other relief provided for the appointment of the Receiver and restrained Defendants from disposing of assets.¹ See Statutory Restraining Order and Order Appointing Receiver dated April 1, 2004 at Sections I and II (hereinafter the "Statutory Restraining Order"). The Statutory Restraining Order further authorized the Receiver to "[t]ake exclusive custody, control, and possession of all the funds, property, mail and other assets of, in the possession of, or under the control of the Defendants Firth and Equity Financial Group LLC wherever situated and take exclusive custody, control, and possession of all customer funds and property and other assets traceable to customers in the possession of, or under the control of Shimer or Tech Traders, Inc." Id. at Section III A . The Receiver is also required under the Statutory Restraining Order to

¹The Statutory Restraining Order provides in relevant part that Stephen T. Bobo, Esquire, is appointed Temporary Equity Receiver "for the Defendants and their affiliates and subsidiaries, and all funds, properties, premises, accounts and other assets directly or indirectly owned, beneficially or otherwise, by the Defendants, individually or collectively, including, but not limited to, investors' funds, for the purpose of marshalling, preserving, accounting for and liquidating the assets that are subject to this Order and directing, monitoring and supervising Defendants' activities in accordance with the provisions" of the Order. See Statutory Restraining Order at Section III.

"[m]ake payments and disbursements from the receivership estate that are necessary or advisable for carrying out the directions of, or exercising the authority granted by, this Order." Id. at Section III J.

Thereafter, on June 24, 2004, the Court entered a Consent Order of Preliminary Injunction and Other Ancillary Relief (the "Consent Order") against Equity Financial Group, LLC, Vincent Firth, and Robert W. Shimer. This Consent Order, among other items, requires these three Defendants to fully cooperate in providing information to the Receiver on "the source, amount, disposition, and current location of all funds, securities, commodity interests, assets and other property transferred or otherwise disposed of directly or indirectly" by these Defendants. See Consent Order at ¶ 9.

Presently before the Court are motions filed by the Receiver seeking to compel Defendant Shimer to produce tax returns for the years 1999 through 2003 and Defendant Firth to produce tax returns for the years of 2004 and 2005. With respect to Defendant Shimer, the Receiver asserts that the Statutory Restraining Order entered in this case requires Defendant Shimer to produce key financial information including the requested tax returns. See Brief in Support of Equity Receiver's Motion to Compel Robert Shimer to Produce Tax Returns at 2 (hereinafter "Receiver's Brief"). The Receiver alleges that he is required to determine Defendant

Shimer's federal tax liability under 31 U.S.C. § 3713(a)(1)(A)(iii) and that the returns are necessary for that purpose as well. Id. The Receiver also alleges that the returns are necessary in order for the Receiver to corroborate Shimer's financial condition. In this regard, the Receiver asserts that the Receiver "may deem it appropriate to initiate a claim process for Mr. Shimer's creditors." Id. at 3. The Receiver also asserts that he has not been provided with a complete set of relevant bank records regarding Defendant Shimer's accounts and that Defendant Shimer's statements about his current assets and liabilities are irreconcilable. In addition, the Receiver seeks Defendant Shimer's tax returns from 1999 through 2003 because Defendant Shimer is alleged to have started soliciting investors and taking in investor funds in the same year. Id. at 3. Specifically, the Receiver asserts that Defendant Shimer opened bank accounts in the name of Kaivalya Holding Group ("Kaivalya") for these investor funds and that "from 1999 through 2001, he transferred \$228,230 from Kaivalya bank accounts to accounts maintained in his name." Id. The Receiver further states that from 2002 through March 2004 Defendant Shimer "transferred to Kaivalya over \$1.3 million of funds originating from Tech Traders investors." Id. at 3.

With respect to Defendant Firth, the Receiver asserts that all the reasons stated with respect to Defendant Shimer "apply with equal force to Mr. Firth." See Brief in Support of Equity

Receiver's Motion to Compel Vincent Firth to Produce Tax Returns at 2.

In opposition to the Receiver's motion, Defendant Shimer asserts that the only tax return that the Receiver should need, if he in fact needs any at all, is the 2004 return that has already been provided. See Brief in Support of Defendant's Opposition to the Temporary Receiver's Motion to Compel at 3-4 (hereinafter "Def. Shimer's Opposition"). Defendant Shimer alleges that his 2004 tax return provides a full understanding of his assets and liabilities, as well as income and expenses and that previous returns will provide no further assistance. Id. at 6. Further, Shimer disputes that the Receiver requires the returns to determine if there are any tax liabilities for prior years, and states that he will provide proof that he paid all tax obligations in each year. Id. at 5-8. Defendant Shimer further asserts that the Receiver has no right to view his 1999 and 2000 tax returns because he has not been accused of any Commodity Exchange Act violations in those years. Id. at 9. Although acknowledging that it is the Receiver's "responsibility to trace and account for every dollar paid to anyone by Defendant Tech Traders, Inc.," he asserts that he has provided all banking records and accounting records in his possession. Id. at 9. Moreover, he asserts that "[t]he merits of Kaivalya's investments are clearly beyond the scope of the present civil action." Id. at 10.

Defendant Firth objects to the Receiver's motion for a number of reasons set forth in his opposition brief. Specifically, Defendant Firth asserts that production of his tax returns for the tax years 2004 and 2005 are not warranted. He further asserts that "[t]here is absolutely no evidence that" he received any "investor source funds" since March 2004 and that he "only received funds that originated from Tech Traders as a result of legitimate agreements executed by authorized parties for the period of time between June 2002 and March 2004." See Brief in Support of Defendant's Opposition to the Temporary Equity Receiver's Motion to Compel Vincent Firth to Produce Tax Returns at 2. Defendant Firth further argues that his tax information is highly confidential and that it is premature to order his tax information until there has been a trial on the merits or until the Court rules on the pending dispositive motions. Id. at 6.

The Court notes that the Statutory Restraining Order clearly requires that the Defendants provide "any information to the Receiver that the Receiver deems necessary to exercising the authority and discharging the responsibilities of the Receiver under this Order." See Statutory Restraining Order at Section V. Moreover, the Consent Order specifically provides that these Defendants "cooperate fully in providing information to the Receiver" as set forth therein. See Consent Order at ¶ 9. In addition, as noted by the Receiver, the Consent Order further

restrains these Defendants from directly or indirectly dissipating, concealing or disposing cash or other assets, including assets acquired after June 24, 2004. See Consent Order at ¶ 5A. The Receiver asserts that the requested tax returns are necessary in order for the Receiver to discharge his duties including the need to review the returns to gain a "full understanding" of these Defendants' assets. See Aff. of Receiver dated December 19, 2005 at ¶ 10; Aff. of Receiver dated June 28, 2006 at ¶ 10. Having reviewed the submissions, the Court concludes that the Receiver has adequately demonstrated that the requested returns are required to be produced under the Statutory Restraining Order and the Consent Order.

Moreover, the Court rejects Defendant Shimer's argument that the tax returns sought are irrelevant since they relate to 1999 through 2003. As noted by the Receiver, the Receiver's duties are not limited by the allegations of the CFTC. The Receiver has demonstrated that the 1999 to 2003 tax returns of Shimer are necessary in light of the investment activity involving Kaivalya that began in 1999. See J. McCormack Dec., attached as Exhibit B to Motion to Compel Defendant Shimer's Tax Returns at ¶ 7.²

²Having concluded that under the Court's prior orders, the Receiver is entitled to Defendant Shimer's returns for the years 1999 through 2003 as a result of Defendant Shimer's alleged investment activity during that time period, the Court need not determine whether the federal priority statute relied upon by the Receiver serves as an independent basis for the tax returns filed prior to the entry of the Statutory Restraining Order.

Similarly, the Court finds as to Defendant Firth that the Receiver's request for the 2004 and 2005 returns are not limited by CFTC's allegations. Defendant Firth has been under receivership since April 2004 and the Court finds that the Receiver is therefore entitled to the tax returns for the years 2004 and 2005 in order for the Receiver to fulfill his receivership duties. The Court finds that Defendant Firth's objections to the motion to compel relate to his position that he is not liable in this action, but do not serve as a basis to reject the Receiver's request under the prior orders of this Court.

The Court notes that both Defendants claim that the tax returns are highly confidential. However, the Receiver has agreed to designate the returns as confidential.³ Consequently, the Defendants' objections to production of the tax returns on this basis is rejected as well.

Finally, the Court notes that although the Receiver seeks expenses incurred in making these motions under FED. R. CIV. P. 37(a)(4)(A), the Court shall not award fees at this time as the basis for production is not FED. R. CIV. P. 26, but rather relates to the Receiver's duties and powers under the Court's Statutory Restraining Order and Consent Order. Therefore, the request for fees shall be denied.

³If the Receiver and Defendants do not agree to the confidentiality terms, the parties are directed to request a conference with the Court to address this issue.

Consequently, for the reasons set forth above, and for good cause shown:

IT IS on this 1st day of September 2006, hereby

ORDERED that Receiver's motions to compel [#295 and #369] shall be, and hereby are, **GRANTED**; and it is further

ORDERED that Defendant Robert Shimer shall produce copies of his income tax returns for the years 1999 through 2003 to the Receiver within fifteen (15) days of entry of this Order; and it is further

ORDERED that Defendant Vincent Firth shall produce copies of his income tax returns for the years 2004 and 2005 to the Receiver within fifteen (15) days of entry of this Order; and it is further

ORDERED that the Receiver's requests for expenses under Fed. R. Civ. P. 37(a)(4)(A) shall be, and hereby is, **DENIED**.

s/ Ann Marie Donio
ANN MARIE DONIO
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Robert B. Kugler